SUPREME COURT OF THE UNITED STATES.

No. 134.

THE GRAND TRUNK RAILWAY OF CANADA, PLAINTIFF IN ERROR,

vs.

ANSEL STEVENS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

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1 *Writ of error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States, holden at Portland, within and for the district of Maine, greeting:

[SEAL.]

Because that in the record and process, and also in the rendering of judgment, in a suit before you, or some of you, between Ansel Stevens, of Gorham, in the county of Cumberland and State and district of Maine, plaintiff, and the Grand Trunk Railway of Canada, a corporation duly organized under the laws of the Dominion of Canada, and having its place of business at Portland, in said county of Cumberland, defendant, in a plea of the case, a manifest error has intervened, to the great damage of the said Grand Trunk Railway of Canada, as in its complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning the same, and this writ, so that you have the same before the Chief-Justice and the associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, being the present seat of the
2 National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, at Washington aforesaid, this eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-five.

GEO. F. EMERY, *Clerk.*

Allowed by—

G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

Return.

Circuit court of the United States, district of Maine.

And now here the judges of the circuit court of the United States, in and for said district, make return of this writ, by annexing hereto, and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, Geo. F. Emery, clerk of said circuit court, have hereunto set my hand and affixed the seal of said court, this thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] GEO. F. EMERY, *Clerk.*

3 *Copy of judgment.*

UNITED STATES OF AMERICA,
District of Maine, ss:

At a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine,

on the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-four—

Present, the honorable Edward Fox, district judge.

ANSEL STEVENS, OF GORHAM, IN THE COUNTY OF Cumberland and State of Maine, plaintiff,
against
THE GRAND TRUNK RAILWAY OF CANADA, a corporation duly organized under the laws of the Dominion of Canada, and having its place of business at Portland, in the county of Cumberland, defendant.
} No. 115.

In a plea of the case, for that whereas, on the first day of May, A. D. 1873, at said Portland, and ever since that time, the defendant corporation was, has been, and now is a common carrier, and during all that time has been accustomed to carry for hire all persons requesting thereto from said Portland to Montreal, in the Dominion of Canada, and the plaintiff on said last-named day, at said Portland, did, then and there, engage a passage in the cars of said defendant corporation, and the said defendant corporation did, then and there, in consideration of a certain reasonable reward, then and there paid by the plaintiff to the said defendant corporation, undertake and promise to safely carry the plaintiff upon his passage from said Portland to said Montreal, and him there safely deliver; yet the said defendant corporation
4 did not safely carry the plaintiff in his said passage, and him there safely deliver, as aforesaid; but, on the contrary, by reason of the insufficiency of the track and cars of the said defendant corporation, and the careless and negligent manner in managing them by the said defendant corporation, by their agents and servants employed for that purpose, one of their cars was thrown from the said track at Soixante, in the Dominion of Canada, on the second day of May last past, and the plaintiff then and there, on said passage, and in the night-time of said day, being sleeping therein, and in the exercise of due care and caution, was thrown with great violence from his bed, and, by means of the said cars being thrown from the track as aforesaid, suffered severe contusions upon his left elbow, right arm, back, and left hip, and upon divers other parts of his body, and was seriously burnt upon his right hand, and suffered severe injuries internally, and received various bruises upon his back, arms, and legs, and received serious and incurable injury to his spine, and has been incapacitated from performing any labor, and put to great expense for nursing and medicine, and suffered intense pain since receiving said injuries as aforesaid, and by reason thereof and is thereby rendered a cripple for life and unfitted from pursuing his usual and ordinary avocation.

Also, for that whereas the said defendants, before and at the time of the making of their promise and undertaking, hereinafter next mentioned, were the owners and proprietors of a certain railway track and passenger-cars thereon going and passing from a certain place,
5 to wit, from said Portland to a certain other place, to wit, to Montreal, in the Dominion of Canada, for the carriage and conveyance thereby of passengers for certain reasonable hire and reward to the said defendants in that behalf, to wit, at said Portland, and thereupon heretofore, to wit, on the first day of May last past, at said Portland, in consideration that the said plaintiff, at the special instance and request of the said defendants, would take and engage a place and seat

in said passenger-cars, to be carried and conveyed in and by the said passenger-cars from Portland aforesaid to Montreal aforesaid, at and for a certain reasonable reward and valuable consideration, to be therefor paid by the said plaintiff to the said defendants in that behalf, and then and there passing from the said plaintiff to the said defendants in that behalf, they, the said defendants, then and there undertook and faithfully promised the said plaintiff to carry and convey the said plaintiff from said Portland to said Montreal, and to use due care and diligence in and about so carrying and conveying him as aforesaid.

And the said plaintiff in fact saith that he, confiding in the promise and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, at Portland aforesaid, take and engage a place and seat in the said passenger-cars, to be carried and conveyed in and by the said passenger-cars from Portland aforesaid to Montreal aforesaid, and to use due care and diligence in and about so carrying and conveying him as aforesaid, and did then and there pay to the said defendants a reasonable
6 reward for the carriage and conveyance of the said plaintiff as aforesaid, and a certain valuable consideration then and there passed from the said plaintiff to the said defendants for the carriage and conveyance of the said plaintiff as aforesaid. And although the said plaintiff, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the day aforesaid, at said Portland, become and was such passenger in and by the said passenger-cars to be carried and conveyed in and by the same from Portland aforesaid to Montreal aforesaid, yet the said defendants, not regarding their said promise and undertaking, so by them made in form and manner aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would use due and proper care, skill, and diligence in and about the carrying and conveying the said plaintiff in and by the said passenger-cars from said Portland to said Montreal, but then and there wholly neglected and refused so to do, and, on the contrary thereof, so carelessly, improperly, negligently, and unskilfully so managed their said railway-track and said passenger-cars that afterwards, and whilst the said passenger-cars were passing from Portland aforesaid to Montreal aforesaid, on the second day of May last past, at Soixant, in the Dominion of Canada, by means of the said negligence, carelessness, and improper conduct of the said defendants, and their agents and servants in that behalf, one of the said passenger-cars in which the said plaintiff
7 then was, was thrown from the said track, by means of which said several premises the right hand of the said plaintiff became and was badly burned, his left elbow jammed, his right arm and left hip and divers other parts of his body badly lamed, jammed, bruised, and otherwise grievously injured, and the back and spine of the plaintiff were greatly lamed and injured, and he, the said plaintiff, was then and there in other respects greatly hurt, bruised, and wounded, and was sick, sore, lame, and disordered, and so remained and continued for a long space, to wit, hitherto and still so remains, during all which time he, the said plaintiff, suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted, and the said plaintiff is still so hindered and prevented from performing said affairs as aforesaid, and is, by the said injury to his back and spine, rendered lame and invalid for life, and is thereby also incapacitated for life for engaging in business and earning his own support; and also by the injuries aforesaid he, the said plaintiff, was forced, and

obliged to, and did ne'essarily pay, lay out, and expend a large sum of money, to wit, the sum of five hundred dollars, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, disorder, and injuries aforesaid, occasioned as aforesaid, to wit, at said Soixant, on the second day of May last past.

Also, for that whereas, on the first day of May, A. D. 1873, at
8 said Portland, and ever since that time, the defendant corporation was, has been, and now is a common carrier, and during all that time has been accustomed to carry, for hire, all persons requesting thereto from said Portland to said Montreal, in the Dominion of Canada, and also to carry, without hire, all such persons as one J. N. Martin and one Herbert Wallis, the proper officers and agents of said defendant corporation, in that behalf duly appointed, should issue passes and permits to, the said J. N. Martin and Herbert Wallis did, on the day af resaid, at Portland aforesaid, issue to the said plaintiff their pass, permit, or writing obligatory of said date for a passage in the railway-cars and over the railway of said defendant corporation from said Portland to said Montreal, whereby the said defendant corporation, in consideration of the said plaintiffs entering into the cars of said defendant corporation and travelling therein from said Portland to said Montreal, then and there undertook and promised to safely carry the plaintiff upon his said passage from said Portland to said Montreal, and him there safely deliver; and the said plaintiff thereafterwards, to wit, on the day and year aforesaid, at said Portland, in consideration of the promise of the defendant corporation, in that behalf, entered into the cars of said defendant corporation running between said Portland and said Montreal; yet the said defendant corporation did not safely carry the said plaintiff on his said passage and him safely deliver as aforesaid, but, on the contrary, by reason of the insufficiency of the
9 tracks and cars of the said defendant corporation, and the carelessness and gross negligence of the agents and servants of the said defendant corporation employed for the management of the cars, engines, and tracks of said defendant corporation, the car in which the said plaintiff was making the said passage was thrown from the said track, to wit, at Soixant, in the Dominion of Canada, on the second day of May, A. D. 1873, and the said plaintiff being then and there lawfully and properly therein, and in the exercise of due care and caution, was then and there thrown with great violence from his place therein, and by means thereof his right hand was then and there badly burned by coming in contact with the steam-heaters in said car, his left elbow jammed, his right arm lamed, his left hip bruised, and his back and spine seriously lamed and injured, and other grievous injuries, contusions, lamenesses, then and there suffered by the said plaintiff by reason of the said cars being thrown from the said track as aforesaid; and the said plaintiff was, by reason of the same, incapacitated from performing any labor, and put to great expense for nursing and medicine, and has suffered intense pain since receiving said injuries as aforesaid and by reason thereof, and is thereby rendered an incurable invalid, and incapacitated for performing any business and pursuing his usual and ordinary avocations.

Also, for that whereas, on the first day of May last past, at said Port-
10 land, and ever since that time, the said defendant corporation was, has been, and now is a common carrier of passengers and freights, and during that time has been accustomed to carry for hire all persons requesting thereto from said Portland to Montreal, in the Dominion of Canada; and whereas the said defendant corporation was anx-

ious and desirous, to wit, at said Portland, on the day and year aforesaid, of obtaining the advice, assistance, and co operation of the said plaintiff in and about certain business and affairs of the said defendant corporation, and of the agents thereof, and was, for the purpose aforesaid, anxious and desirous that the said plaintiff should meet, confer with, advise, and transact the said business for and with the said agents of said defendant corporation at said Montreal, and the said plaintiff then and there, at the special instance and request of the said defendant corporation, promised the said defendant corporation to go to said Montreal for the purpose and business of the said defendant corporation aforesaid; and the said defendant corporation then and there, in consideration of the said promise of the said plaintiff, undertook and promised to safely carry the plaintiff upon his said passage from said Portland to said Montreal, and him there safely deliver, and the said plaintiff thereafterwards, to wit, on the same day at said Portland, took passage in the cars of the said defendant corporation for said Montreal;

11 yet the said defendant corporation did not safely convey the plaintiff on his said passage, and him safely deliver as aforesaid, but on the contrary thereof, by reason of the insufficiency of the track and cars of the said defendant corporation, and the carelessness and neglect of duty of the agents and servants of said corporation in managing, running, and guarding the same, one of the said cars was thrown from the said track, to wit, at Soixant in the Dominion of Canada, on the second day of May last past, and the plaintiff then and thereupon, the said passage being lawfully and by right therein, and in the exercise of due care and caution, was thereby thrown from his place in said car with great violence, and divers parts of his body were then and there grievously burned, jammed, lamed, bruised, and internally injured, and his back and spine were then and there thereby incurably injured, and the said plaintiff has been thereby incapacitated for life from performing any manual labor, and put to great expense for nursing and sickness, and suffered intense pain, protracted sleeplessness, and great bodily suffering since receiving said injuries as aforesaid, and by reason thereof, and is thereby rendered a cripple for life and unfitted for pursuing his usual and ordinary avocations.

Also, for that whereas, the said defendant corporation was on the day and year aforesaid, to wit, at said Portland, a common carrier of passengers between said Portland and said Montreal, the said defendant

12 corporation then and there promised and undertook, for a certain valuable consideration then and there passing from the said plaintiff to the said defendant corporation, to safely carry and convey the said plaintiff from said Portland to said Montreal upon their passenger-trains running therebetween, in accordance with their duties and obligations as common carriers of passengers as aforesaid, and the said plaintiff thereafterwards, to wit, on the same day, at said Portland, took passage from said Montreal on one of said passenger-trains, and the said defendant corporation did not safely carry and convey the said plaintiff as aforesaid, but then and there conducted itself so negligently in that behalf that certain cars upon said passenger-train were, by reason of the carelessness and negligence of the said defendants' agents and servants, thrown from the track of said defendant corporation, to wit, at Soixant, in the Dominion of Canada, on the second day of May last past, and the plaintiff, being in one of the cars so thrown from the track as aforesaid, was then and there, by reason thereof, (and without negligence on his part,) grievously bruised, burned, jammed, lamed, and internally injured, and then and there, by reason of said cars being thrown

from the track as aforesaid, suffered serious injury to his spine, and has thereby been put to great trouble, suffering, expense, and incapacitated from performing any labor or pursuing his usual avocations further.

Also, for that whereas, on the first day of May last past, at said Portland, and ever since that time, the said defendant corporation was,
13 has been, and is a common carrier of passengers and freight between said Portland and Montreal, in the Dominion of Canada; and whereas the said plaintiff was then and there owner of a certain invention known as a car-coupler, secured by letters-patent dated May fourteenth, A. D. 1872, duly issued by the Patent-Office, in the name of the United States, and the said defendant corporation was then and there desirous of using said invention upon their railway running from said Portland to said Montreal, and had previously thereto, to wit, at said Portland, on the first day of April, A. D. 1873, agreed to and with the said plaintiff to send one W. McWood, the agent of said corporation, from Montreal to Portland to conclude an agreement between said corporation and said plaintiff for the use of said invention upon the line of said railway, and the said plaintiff had then and there, in consideration of the said agreement of the said defendant corporation, agreed to sell the use of said invention to said defendant corporation on the line of their said railway for a reasonable compensation, to be then and there paid by said defendant corporation to said plaintiff, and the said defendant corporation thereafterwards, to wit, on the twenty-fifth day of April, A. D. 1873, requested the said plaintiff to release them from their said agreement, and in consideration of said release and of said plaintiff's agreement to go to said Montreal to complete the said agreement with the said McWood at that point, agreed to and with the said plaintiff to safely and securely transport and carry him to Montreal, over the line of said railway from said Portland, and to pay the expenses
14 of his journey from said Portland to said Montreal; the said plaintiff, in consideration of the said agreement and promises of the said defendant corporation agreeing to and with the said defendant corporation to take the journey aforesaid, and to complete the agreement aforesaid with the said McWood at said Montreal, and the said defendant thereafterwards, to wit, on the first day of May, A. D. 1873, in pursuance of the aforesaid agreement, entered into the cars of the said defendant corporation passing from said Portland to said Montreal, and the said defendant corporation then and there, for the foregoing valuable consideration, accruing from the said plaintiff to the said defendant corporation, undertook and promised the said plaintiff to safely carry him, the said plaintiff, upon his passage from said Portland to said Montreal, and him there safely deliver; yet the said defendant corporation did not safely carry the said plaintiff upon his passage from said Portland to Montreal aforesaid, and him there safely deliver as aforesaid, but, on the contrary, by reason of the insufficiency of the track and cars of said defendant corporation, and the careless and grossly negligent manner in managing the same by the said defendant corporation by their agents and servants employed for that purpose, the car in which the said plaintiff was making the said passage was thrown from the said track, to wit, at Soixant, in the Dominion of Canada, on the second day of May, A. D. 1873, and the said defendant was then and there lawfully therein, and, in the exercise of due care and caution, was then and there thrown with great violence from his
15 place therein, and by means thereof his right hand was then and there badly burned, his left elbow jammed, his right arm lamed, his left hip bruised, and his back and spine seriously injured, and other

grievous injuries, contusions, lameness then and there suffered by the said plaintiff by reason of the said cars being thrown from the said track as aforesaid, and the said plaintiff was by reason of the same incapacitated from performing any labor, and put to great expense for nursing and medicine, and has suffered intense pain since receiving said injuries, as aforesaid, and by reason thereof, and is thereby rendered an incurable invalid, and incapacitated from performing any business, and pursuing his usual and ordinary avocations, to the damage of the said plaintiff, as he says, the sum of sixteen thousand dollars.

This action was originally brought for and entered in the superior court holden at Portland, within and for the county of Cumberland, in the State of Maine, on the first Tuesday of February, in the year of our Lord one thousand eight hundred and seventy-four, when and where the defendant company filed a petition alleging that they then, and on the second day of January then last past, (being the date of the writ,) were a corporation created by the legislature of the Province of Canada, and all whose members were aliens, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and praying that the said cause might "be removed for trial into the
16 next circuit court of the United States to be holden at Portland, within and for the district of Maine, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy-four."

And thereafterwards, to wit, on the fifth day of the said February term of said superior court, the bond in such case made and provided having been filed and approved, the prayer of the said petition was allowed, and it was "ordered by the court that said action be transferred to the circuit court for the district of Maine, as prayed for in said petition. And at said April term of this court said cause was entered by the defendant company, and copies of the case filed therein on the first day of its session, according to the provisions of the statute of the United States in such case made and provided. Said cause was then continued to this term."

And now the said def'ts come and defend, &c., when, &c., and say they never promised in manner and form as the pl'f has in his writ and declaration alleged against them. And of this they put themselves on the country.

By J. & E. M. RAND,
Their Att'ys.

And the plaintiff doth the like.

By MATTOCKS & FOX,
His Attorneys.

And now, before a jury duly impaneled and sworn, after a full hearing of the evidence, the counsel for the defendant company requested the court to give certain rulings, directions, and instructions to the jury, each and all of which instructions and requests of the defendant were then and there refused by the court as inap-
17 plicable to the evidence produced; to which refusal, and each and every of them, the defendant then and there in open court, and before the case was committed to the jury, excepted, and prayed of the court that said exceptions, and each of them, might be allowed. But the court, instead of the instructions requested by the defendant, did give to the jury certain other instructions. Whereupon, and before the cause was committed to the jury, the defendant then and there excepted to the rulings, directions, and instructions so by the court given

to the jury as aforesaid, and to each and every part thereof, and in open court prayed that said exceptions and each of them might be allowed. All of which exceptions were then and there allowed, and the said defendant's bill of exceptions so allowed, and signed by the presiding judge, is then and there placed on file; and said cause is thereupon committed to the jury, who, after mature deliberation thereon, return their verdict, and "find that the defendant company did promise in manner and form as the plaintiff in his writ and declaration hath alleged, and assess damages for the plaintiff in the sum of twelve thousand eight hundred thirty-three $\frac{33}{100}$ dollars." All which being seen and understood, it is, therefore, considered by the court here, to wit, on the fourth day of January, in the year of our Lord one thousand eight hundred and seventy-five, that the said Ansel Stevens recover of
the said Grand Trunk Railway of Canada said sum of twelve
18 thousand eight hundred thirty-three $\frac{33}{100}$ dollars, with interest
thereon from the day of the rendering of said verdict, to wit, from the fourteenth day of October, in the year of our Lord one thousand eight hundred and seventy-four, being one hundred and eighty-six dollars and seven cents, in all amounting to the sum of thirteen thousand nineteen dollars and forty cents, and his costs of suit, taxed at one hundred and twenty-one dollars and twelve cents.

Attest:

GEO. F. EMERY, *Clerk.*

Recorded from the original papers and minutes.

By GEO. F. EMERY, *Clerk.*

19 *Exceptions.*

UNITED STATES OF AMERICA:

Circuit court of the United States, first circuit, Maine district, September T., 1874.

ANSEL STEVENS
v.
THE GRAND TRUNK RAILWAY COMPANY OF Canada.

Be it remembered that at a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on the twenty-third day of September, A. D. 1874, by the honorable Edward Fox, district judge, came Ansel Stevens, of Gorham, in the State of Maine, a citizen of said State of Maine, and by a writ of assumpsit declared against the Grand Trunk Railway Company, of Canada, a corporation duly organized under the laws of the Dominion of Canada, and all whose members are aliens; said action having been commenced on the second day of January, A. D. 1874, by writ returnable in the superior court for the county of Cumberland, in the State of Maine, at the term holden at Portland, in said county, on the first Tuesday of February, A. D. 1874; and the matter in dispute exceeding five hundred dollars, exclusive of costs, the said Grand Trunk Railway of Canada, at the time of entering their appearance in said suit before the said superior court, filed their petition for the removal of said cause for trial into the next circuit court of the United States to be held in this district, and offered good and sufficient surety for entering in

such circuit court, on the first day of its session, copies of the process.

And the said Grand Trunk Railway Company, of Canada, did, on
20 the first day of the session of the circuit court, in this district, next after the first Tuesday of February, A. D. 1874, viz, at the session of the circuit court held at Portland, in said district, on the twenty-third day of April, A. D. 1874, appear and enter in said circuit court said action and copies of said process against them. And the said Ansel Stevens, the plaintiff, also then and there appeared, and said action was thence continued until the present term, when the parties appeared, and the said defendants pleaded the general issue, which was joined by the plaintiff, as by the writ and declaration and the pleas aforesaid, all of record, will appear. And thereupon said cause came on for trial before said circuit court, at said September term, before a jury empannelled for that purpose; and the said plaintiff, to maintain and prove the issue on his part, introduced in evidence the deposition of Henry W. Alloway, which was as follows, viz:

HENRY ALLOWAY, a witness for plaintiff, in answer to interrogatories, deposed as follows, viz:

1. State your name, age, business, and place of residence.

Answer. My name is Henry Alloway; aged thirty-five years. I have no present occupation, being disabled from sickness. My place of residence is the town of Gneefth, in the Province of Ontario, in the Dominion of Canada.

2. Were you or not on any Grand Trunk Railway trains, running between Portland, Maine, and Montreal, on the 1st and 2d days of May, A. D. 1873?

Answer. I was.

21 3. If yea, on what train or trains, and in what capacity?

Answer. I was on the morning train from Portland on the second day of May, A. D. 1873, in the capacity of conductor of the Pullman car attached to said train.

4. Were you or not present at any accident occurring on the line of said road upon the days mentioned? If yea, state accurately when and where, and to which train, if either, said accident occurred.

Answer. I was present when an accident occurred to the said morning train so leaving Portland as aforesaid on the second day of May, 1873. The accident occurred at about a quarter to five o'clock in the morning of the said second day of May, at about half a mile east of the Soixante Station, in the Province of Quebec. The accident happened to the said morning train.

5. State fully the nature of said accident, all important particulars relating thereto, and the extent of damage done.

Answer. The first intimation I had of the accident was that the Pullman car was off the track. It ran along upon the ties for about forty rods, and then turned over the embankment, making about one and a half revolutions in turning. There were twelve or fourteen passengers in said Pullman car. The most of the passengers were more or less injured. I was myself injured, but exerted myself in rescuing the passengers from the Pullman car and getting them into a forward
22 car. The Pullman car and the two passenger cars immediately in front of it went down the embankment. The engine, tender, and three passenger cars of the train remained on the track. There were six passengers, besides myself who were severely injured. The cars which went off the track were badly broken.

6. State whether or not you examined into the condition of the track

and sleepers in the vicinity of the accident after the accident? If yea, state in what condition you found them.

Answer. I did go onto the track to examine its condition. I found that the track had spread, caused by some previous car running off the track so as to break the bolts from off the fish-plates holding the ends of each rail. This was the condition of the track for over a half a mile, as I saw it.

7. Give, as accurately as possible, the relative position of each car, engine, and tender, after the accident, stating their relative position each to each and to the railway track.

Answer. The cars that went over the embankment ceased to revolve at about fifteen feet from the track. The cars that remained on the track stopped at about seventy or eighty feet from where the cars went off the track.

8. Describe the grade of the railway—whether carried upon an embankment or through a cut—at the place of the accident, and the height of embankment or depth of cut.

23 Answer. It is an embankment, extending several miles upon that section. The embankment at the point of accident was from eighteen to twenty feet high.

9. Were or not any Pullman sleeping-cars attached to the train at the time of the accident? If yea, how many?

Answer. There was one Pullman car only attached to the train.

10. Were they or not heated? And if yea, in what manner?

Answer. It was heated by hot-air pipes passing around the sides and under the seats of the car.

11. State, if examined by you, in what condition the heating apparatus was after the accident?

Answer. I did not examine the heating apparatus carefully on account of my injury; but I saw, however, that the furnace was partly turned over.

12. Of what did the entire train consist?

Answer. The train consisted of engine, tender, baggage, mail, and five passenger and Pullman cars.

13. About how many passengers were on board the train, and how disposed, i. e., about how many in each car, and about how many in sleeping-sections at the time of the accident?

Answer. I cannot state how many passengers were on the train or how they were disposed in each car. There were about fourteen passengers in the sleeping-car at the time of the accident.

14. State, if you know, how many individuals engaged sleeping accommodations for the night of May first, 1874, in the Pullman car of which you were conductor?

24 Answer. About fourteen.

15. Describe the condition of the track in front of your engine after the accident?

Answer. I cannot describe it otherwise than as in answer to interrogatory number six.

16. If torn up or damaged, state how long a distance you noticed it to be in that condition?

Answer. About half a mile.

17. State also the condition of the track in rear of your train after the accident, and describe the difference, if any, between that in front and that in rear?

Answer. The rails in rear of my car were spread further than in front of the engine.

18. State also the condition of the road-bed in front and in rear of your train after the accident.

Answer. The ties were somewhat torn and the road-bed was in fair condition.

19. What, if any, notice or knowledge, official or personal, have you at any time or times received of any accident happening in the same vicinity to any of the three trains which preceded your own? State fully what such knowledge or notice was.

Answer. I had no notice or knowledge.

20. Which, if either, of said preceding met with such accident, and who was the conductor of said train? If you have not personal knowledge as to who such conductor was, state whatever official knowledge you have thereon.

Answer. I have no knowledge which preceding train met with an accident, but have no doubt that one of the cars immediately preceding the passenger train above mentioned must have ran off the track, and may have ran on to the track unobserved by the conductor of that train, whose name is Albert Atchison.

21. Is, or not, this same conductor still in the employ of the Grand Trunk Railway?

Answer. He is not.

22. What was the cause or causes of the accident that occurred to your train?

Answer. The spreading of the rails, occasioned by the breaking of the bolts, as above stated.

23. If you have in your possession any official time-table issued by the Grand Trunk Railway, and covering the month of May, 1873, and the section of the road where the accident or accidents occurred, please to annex the same to your answers to these interrogatories.

Answer. I have not.

24. What were the numbers of your own train and the three next preceding?

Answer. I think our train was number three. I do not know the numbers of the three next preceding trains.

25. What was the number of the train, if any, to which an accident occurred in that vicinity, next preceding your own?

Answer. I do not know.

26. Do you recollect seeing this plaintiff at the time or on the day of the accident to your own train? If yea, state how he appeared, and the nature of his injuries observed by you, if any.

Answer. I do remember seeing the plaintiff upon the train to which I belonged at the time of the accident. He appeared to be badly injured in his back, and was bleeding from the nose, and appeared to be badly bruised.

Plaintiff also introduced witnesses who testified as follows, viz:

George H. Greeley testified: I reside at Bangor; am in the general railroad-ticket business. On May 2, 1873, was a passenger from Portland to Montreal, on Grand Trunk Railroad; was in Pullman car; left here at 1:30 p. m. Stevens was also a passenger for Montreal. About 5¼ a. m. we went down an embankment, & turned over. I was the only person up. The train parted; the Pullman and two other passenger-cars going down embankment, and the other cars staying on track. I was the first passenger out of car. Saw Stevens after the accident. Car came right side up. Stevens was down in the bottom of the car, with seats or berths on him; don't know whether on his back or face.

I afterwards walked on track for about 10 rods, to see its condition. I should say one pair of trucks had jumped the rail, and the flange of the wheel on the left-hand rail was hugged close to the rail on the outside, and crowded or cut off the heads of the spikes and the nuts of the bolts that held the fish-plates; many of the rails were half-rails, or pieces of rails; track was torn up for 4 or 5 rods behind us, and for 10 rods ahead of our locomotive the bolts and nuts of the fish-plates were off.

I did not then examine the track further. I have been at same
27 place since within a month; examined the place, with a M'r Stevenson; I pointed out the place to him. I examined road-bed and track from Soixante to S't Hila're; track had been replaced at place of accident. That morning, at time of accident, I saw all the train hands. I went on to Montreal; saw the general manager there; had no special conversation with him about the accident. Stevens was in my room, at Montreal, several times the day he was there. I didn't see any scars about him; saw he stooped over some, like a man with cramp; both his hands were burnt a little. Train went nearly 40 feet from track, and about 18 or 20 feet perpendicular. I was not much acquainted with Stevens before, but had seen him sometimes; he was a robust appearing man; he was a conductor on a railroad. We were more than two hours at place of accident, which was ½ to ¾ mile beyond Soixante.

Stephen L. Stevenson testified: I am an engineer; have examined Grand Trunk Railway, between Soixante at S't Hilaire, three or four weeks ago; place of accident was pointed out to me; at that place road runs on an embankment about 15 feet high; place where car rolled was pointed out to me, about 40 feet from track; embankment extends nearly six miles, and was about the natural slope of earth—1½ to 1.

Ansel Stevens, the plaintiff, testified: I live in Gorham. In the
28 spring of 1873, I was trying to introduce a patent car-coupling of my invention; had already introduced it on Old Colony & Ogdensburg roads. It had been used up to that time by Grand Trunk Railway on two cars since Dec., 1872. I put it on by direction of M'r Fry, mechanical superintendent, and the arrangement was that if it gave satisfaction they would adopt it on the road. I saw Fry in April, 1873; cars had run meanwhile, and Fry said they had given satisfaction. He told me there had been a change of officials at Montreal, and that M'r McWood must be consulted, and that he and McWood would see me in Portland on a certain day the last of April, and I agreed to meet them at that time; McWood was superintendent of the car department, I think; I met Fry in Portland the last of April, the day appointed, and he said that McWood could not come; had been detained by business of road, and asked me if I would go to Montreal and see McWood if I could have my expenses paid. I told him I would go, and he fixed the next Thursday, May 1, as the time; at interview with Fry, Benj. Mitchell, car-builder at Portland, was present; Fry told Mitchell to put the two cars on the train which had my coupling to go to Montreal; he told Mitchell to see some person to give me a pass to go. On Thursday I went to depot, and cars were in train; pass was not ready, & conductor kept train waiting; finally the master mechanic brought me a pass, and I got aboard as soon as I received it. I did not look at the pass at that time to read it.

It was folded when I handed it to conductor, and I did not
29 read it. (Witness produces and identifies pass.) I got into the Pullman sleeping-car, and paid the Pullman conductor for my berth. I was in my berth awake at time of accident, say from 5 to 6 a.

m. Can't say how fast the train was going; all at once I felt that car had left the tract, and it seemed to me it went up in the air; thought I was going though opposite window, and put out my hands and pitched into something soft, like a bed. I don't remember anything after that, until I found myself lying in bottom of car. A man came and took something off me and passed out, and I passed out after him. I went back and looked at the car afterwards. It was right side up, about half its width over in a field. Two other cars lay on their sides, forward one badly broken. I felt a sharp pain across the small of my back when I came out of the car. Some time afterwards saw some blood on my hand, and found my right hand was burnt inside across my fingers. Before arriving at Montreal my left elbow began to pain me some, not much, and I began to feel numb and cold; couldn't sit down without feeling worse than standing up. Had quite a number of bruises; right arm bruised. I did not go back to examine cause of accident; walked up the track a short distance, and found most of the spikes on the outside left rail were crowded away or driven in or heads cut off. Bolts of fish-plates were cut off, so that fish plates had dropped on each side. Rails were
30 nearly in position; were old rails patched up. I went ahead ¼ to ½ a mile; road was quite straight. About 1½ hours after accident, I saw a section-man ¾ of a mile off, running and walking towards us with a red flag in his hand. A red flag means danger. He gave me a message to the conductor, which I delivered. I have worked on railroads most of the time since I was 17, and am now 38. About two hours after the accident, I should say, before train started, I went on the engine. At first went about three miles an hour. I could see the left rail ahead; it was, as I have described it, for about 5 miles to a farm-crossing this side of S't Hilaire. Section-man put in spikes occasionally. As they came to farm-crossing, men ahead of engine would throw away pieces of plank, and kick end of rail to pieces. I went on to Montreal, and arrived there a little after ten o'clock. The two cars with my coupling went over at accident and were left there. I saw M'r McWood at Montreal. He had not then seen my coupling. I came back with him the same day to place of accident, but did not stop there; I came home, as I did not feel well, and pain increased. After I reached home I found my arms paining me, and my back and left hip paining me a good deal, and I was lame and stiff all over, but was able to move around; gradually grew worse, lamer and more pain, and pain went to head; not exactly headache, but a sort of pressure on back of head. Saw D'r Tewksbury twice after I got home. He prescribed for me two or three weeks.
My family physician is named French. Have been under his care
31 most of the time since May or June. Also saw D'r Green and D'r Hunt; latter has attended me since June. My condition has been variable; was not confined to bed, but by spells could not sleep at night. My health was good before the accident. Don't think I lost an hour's work for 4 or 5 years. I had been a conductor on P. and Ogdensburg Railroad, but was then on furlough. The pains in my lower limbs have improved; back is lame yet; pain in head still remains; cannot take a step with ease; walking or any exertion tires me very much; staying in any one position troubles me. Have done no work in my patent business at all. I had been receiving before accident $65 per month as conductor. Had introduced my coupling on Ogdensburg and Old Colony roads. Had made arrangements to introduce on the Eastern, but was prevented by this accident. Have not been able to read more than 5 minutes without headache, and can't think about business. That morning at the farm-crossing I saw some pieces of plank where a

car had been put on track. This was about 5 miles from place of accident. I was confined to house about 8 weeks. D'r French came to see me once, and D'r Hunt attended me perhaps once a week. Have consulted him and other physicians when not confined to my house.

On cross-examination testified: I have been employed on railroads as conductor for the last ten or eleven years, part of the time out West and here as passenger-conductor. Used to see free passes very often, and have read them; are not all alike. Some have statements on back and some not. I put this pass in my pocket, and first time conductor
32 came round I couldn't find it. When he came round again I found it; shew' it to him. I had a lower berth in Pullman car, near the end. I paid nothing except for my berth, and paid that to the Pullman conductor. Paid nothing to the train conductor. Was thrown to opposite side of car and landed in something soft. I don't remember striking against anything hard. Can't tell how long before I got up. Car rolled over, and in a few seconds came up right. I remember lying on my face in bottom of car. Tried to get up, but something held me down—an upper berth, I think. Some one took it off; I think a man named Greeley. When I picked myself up I was about midway of car. Went through car an hour or so afterwards, and the inside was all broken up; the outside of car was whole. From S't Hilaire to Montreal I went in the rear car, about 37 miles. The train was stopped at Point S't Charles (Montreal) to let me get off, and I went immediately to see M'r McWood, at his office, a few steps off. I found him in. I told him I thought I was very fortunate; that I was only bruised and burnt a little, and should be over it in a short time. I left Montreal by the afternoon train of that day, and arrived at Portland next day between 2 & 3 p. m., the usual time. I never heard any reason why my coupler was not adopted by Grand Trunk Co. Was requested by Grand Trunk Co. to put on my coupler, and did so. If they liked it they would adopt it. I had arranged with Fry to meet McWood here. On the train I offered terms to McWood, and he said it was cheap enough, but (if he liked it) he couldn't say whether it would be adopted till he con-
33 ferred with the officials. About a week after I got home I consulted D'r Zenksburg. I saw him twice, and he prescribed for me. French was our family physician, and I consulted him, but not often. I have done nothing with my coupler since May, 1873.

Adolphus Brown, called by pl'f, testified: I have known plaintiff 4 or 5 years prior to May, 1873. I know nothing to the contrary of his having general good health; have since seen Stevens about once a month, sometimes in Gorham and sometimes here; have not seen him attending to any business. He seemed feeble and unable to walk far.

Henry H. Hunt and George F. French, physicians, called by plaintiff, testified to the physical condition of pl'f since June, 1873; but their testimony is not material to the questions of law raised and presented by this bill of exceptions.

The plaintiff also produced (upon proper notice and request from the defendant so to do) the "pass" upon which the plaintiff was travelling at the time he sustained the injuries, as above testified, and read the same in evidence in the words and figures following, viz:

GRAND TRUNK RAILWAY OF CANADA.

Employé's pass.

Not transferrable.

Second class. Mechanical department.
Number 301. May 1st, 1873.
Valid only within thirty days from date for one trip west.
[34] Pass M'r Stevens from Portland to Montreal.
Why granted. Per order M'r Fry.
HERB'T WALLIS.

Issued by I. N. Martin.
See other side.

Not transferrable.

On the other side of which were the following printed words, viz:

The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare.

The defendant offered no evidence, but requested the court to instruct the jury as follows:

First. That if the plaintiff at the time of sustaining the injury was travelling under and by virtue of the pass produced in evidence in the case, he was travelling upon the conditions annexed to it.

Second. That if the plaintiff at the time of sustaining the injury was travelling under and by virtue of the pass produced in evidence in the case, the defendants are not liable.

35 Third. That if the plaintiff at the time of sustaining the injury was travelling as a free passenger, the defendants are not liable.

Fourth. That if the plaintiff at the time of sustaining the injury was travelling as a gratuitous passenger, without any consideration to the the defendants for his transportation, the defendants are not liable.

Each and all of which instructions and requests of the defendant were then and there refused by the court as inapplicable to the evidence produced; to which refusal, and each and every of them, the defendant then and there, in open court, and before the case was committed to the jury, excepted, and prayed of the court that said exceptions and each of them might be allowed.

But the court, instead of the instructions requested by def't, did instruct the jury as follows, viz:

That if the jury find that in May, 1873, the plaintiff was interested in a car-coupling, which had been used on the cars of the defendant since December previous, and that the officers of the company were desirous that the plaintiff should meet them at Montreal, to arrange about the use of such coupling on their cars by defendant, and they agreed with him to pay his expenses if he would come to Montreal, and he agreed so to do, and took passage on defendants' cars, and was by the reckless misconduct and negligence of the defendant, and without negli-

36 gence on his part, injured whilst thus a passenger in defendants' car, the defendants are not exonerated from liability to plaintiff for his damages occasioned by such negligence, by reason of the endorsement upon the pass produced in evidence.

Whereupon, and before the cause was committed to the jury, the defendant then and there excepted to the rulings, directions, and instructions so by the court given to the jury as aforesaid, and to each and every part thereof, and in open court prayed that said exceptions and each of them might be allowed.

The jury under the foregoing directions & instructions returned the following verdict, viz:

"The jury find that the defendant company did promise in manner and form as the plaintiff in his writ and declaration hath alleged, and assess damages for the plaintiff in the sum of twelve thousand eight hundred thirty-three $\frac{33}{100}$ dollars.

"KALLUM TUKEY, *Foreman.*"

"The jury were requested to answer the following question if they chose so to do:

"Question for the jury: Had the plaintiff previous to the accident read the pass, and did he know what was endorsed upon it?

"And the following reply was made by the jury thereto:

"Answer. No.

"KALLUM TUKEY, *Foreman.*"

And inasmuch as the matters herein before referred to, and said rulings, directions, and instructions, and said requested instructions would not otherwise appear by the record of said cause, the counsel on the part of the defendant corporation prayed the court to sign this
37 bill of exceptions, containing the several matters given in evidence, and the rulings and instructions of the court thereon, and the refusals of the court and the exceptions thereto, that the same may become a part of the record of said cause; all of which being found to be true is allowed.

In witness whereof I have hereunto set my hand this fourteenth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

EDWARD FOX,
Dis. Judge of M'e.

A true copy of the original on file. Attest:
GEO. F. EMERY, *Clerk.*

38 *Copy of original writ.*

STATE OF MAINE,
[L. S.] *Cumberland, ss:*

To the sheriffs of our several counties, or either of their deputies, greeting:

We command you to attach the goods and estate of The Grand Trunk Railway of Canada, a corporation duly organized under the laws of the Dominion of Canada, and having its place of business at Portland, in our county of Cumberland, to the value of sixteen thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear before our justice of our superior court, to be held at Portland, within and for said county of Cumberland, on the first Tuesday of February, A. D. 1874, then and there in our said court to answer unto Ansel Stevens, of Gorham, in said county, in a plea of the case.

For that whereas, on the first day of May, A. D. 1873, at said Portland, and ever since that time, the defendant corporation was, has been, and now is a common carrier, and during all that time has been accustomed to carry for hire all persons requesting thereto from said Portland to Montreal, in the Dominion of Canada; and the plaintiff, on said last-named day, at said Portland, did then and there engage a passage in the cars of said defendant corporation, and the said defendant corporation did then and there, in consideration of a certain reasonable reward, then and there paid by the plaintiff to the said defendant corporation, undertake and promise to safely carry the plaintiff upon his passage from said Portland to said Montreal, and him there safely
39 deliver, yet the said defendant corporation did not safely carry the plaintiff in his said passage and him safely deliver as afore said, but, on the contrary, by reason of the insufficiency of the track and cars of the said defendant corporation, and the careless and negligent manner in managing the same by the said defendant corporation, by their agents and servants employed for that purpose, one of the said cars was thrown from the said track at Soixants, in the Dominion of Canada, on the second day of May last past, and the plaintiff then and there, on said passage, and in the night-time of said day, being sleeping therein, and in the exercise of due care and caution, was thrown with great violence from his bed, and, by means of the said cars being thrown from the track as aforesaid, suffered severe contusions upon his left elbow, right arm, back, and left hip, and upon divers other parts of his body, and was seriously burnt upon his right hand, and suffered severe injuries internally, and received various bruises upon his back, arms, and legs, and received serious and incurable injury to his spine, and has been incapacitated from performing any labor, and put to great expense for nursing and medicine, and suffered intense pain since receiving said injuries as aforesaid, and by reason thereof, and is thereby rendered a cripple for life, and unfitted from pursuing his usual and ordinary avocation.

Also, for that whereas the said defendants, before and at the time of the making of their promise and undertaking hereinafter next mentioned, were the owners and proprietors of a certain railway
40 track and passenger-cars thereon going and passing from a certain place, to wit, from said Portland, to a certain other place, to wit, to Montreal, in the Dominion of Canada, for the carriage and conveyance thereby of passengers for certain reasonable hire and reward to the said defendants in that behalf, to wit, at said Portland, and thereupon heretofore, to wit, on the first day of May last past, at said Portland, in consideration that the said plaintiff, at the special instance and request of the said defendants, would take and engage a place and seat in said passenger-cars, to be carried and conveyed in and by the said passenger-cars, from Portland aforesaid to Montreal aforesaid, at and for a certain reasonable reward and valuable consideration to be therefor paid by the said plaintiff to the said defendants in that behalf, and then and there passing from said plaintiff to the said defendants in that behalf, they, the said defendants, then and there undertook and faithfully promised the said plaintiff to carry and convey the said plaintiff from said Portland to said Montreal, and to use due care and diligence in and about so carrying and conveying him as aforesaid; and the said plaintiff in fact saith that he, confiding in the promise and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, at Portland aforesaid, take and engage a place and seat in the said passenger-

cars, to be carried and conveyed in and by the said passenger-cars from Portland aforesaid to Montreal aforesaid, and to use due care and diligence in and about so carrying and conveying him as aforesaid, and did then and there pay to the said defendants a reasonable reward for the
41 carriage and conveyance of the said plaintiff as aforesaid, and a certain valuable consideration then and there passed from the said plaintiff to the said defendants for the carriage and conveyance of the said plaintiff, as aforesaid; and although the said plaintiff, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the day aforesaid, at said Portland, become and was such passenger in and by the said passenger-cars, to be carried and conveyed in and by the same from Portland aforesaid to Montreal aforesaid, yet the said defendants, not regarding their said promise and undertaking, so by them made in form and manner aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would use due and proper care, skill, and diligence in and about the carrying and conveying the said plaintiff in and by the said passenger-cars from said Portland to said Montreal, but then and there wholly neglected and refused so to do, and, on the contrary thereof, so carelessly, improperly, negligently, and unskilfully managed their said railway track and said passenger-cars that afterwards, and whilst the said passenger-cars were passing from Portland aforesaid to Montreal aforesaid, on the second day of May last past, at Soixant, in the Dominion of Canada, by means of the said negligence, carelessness, and improper conduct of the said defendants, and their agents and servants in that behalf,
42 one of the said passenger-cars in which the said plaintiff then was was thrown from the said track, by means of which said several premises the right hand of the said plaintiff became and was badly burned, his left elbow jammed, his right arm and left hip, and divers other parts of his body, badly lamed, jammed, bruised, and otherwise grievously injured, and the back and spine of the plaintiff were greatly lamed and injured, and he, the said plaintiff, was then and therein other respects greatly hurt, bruised, and wounded, and was sick, sore, lame, and disordered, and so remained and continued for a long space, to wit, hitherto and still so remains, during all which time he, the said plaintiff, suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted, and the said plaintiff is still so hindered and prevented from performing said affairs as aforesaid, and is, by the said injury to his back and spine, rendered lame and invalid for life, and is thereby also incapacitated for life for engaging in business and earning his own support; and also by the injuries aforesaid he, the said plaintiff, was forced and obliged to, and did necessarily pay, lay out, and expend a large sum of money, to wit, the sum of five hundred dollars, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, disorder, and injuries afore-
43 said occasioned as aforesaid, to wit, at said Soixant, on the second day of May last past.

Also, for that whereas, on the first day of May, A. D. 1873, at said Portland, and ever since that time, the defendant corporation was, has been, and now is a common carrier, and during all that time has been accustomed to carry for hire all persons requesting thereto, from said Portland to said Montreal, in the Dominion of Canada, and also to carry without hire all such persons as one J. N. Martin and one Herbert

Wallis—the proper officers and agents of said defendant corporation, in that behalf duly appointed, should issue passes and permits to the said J. N. Martin and Herbert Wallis—did, on the day aforesaid, at Portland, aforesaid, issue to the said plaintiff their pass, permit, or writing obligatory, of said date, for a passage in the railway cars and over the railway of said defendant corporation, from said Portland to said Montreal, whereby the said defendant corporation, in consideration of the said plaintiffs entering into the cars of said defendant corporation, and travelling therein from said Portland to said Montreal, then and there undertook and promised to safely carry the plaintiff upon his said passage from said Portland to said Montreal, and him there safely deliver. And the said plaintiff thereafterwards, to wit, on the day and year aforesaid, at said Portland, in consideration of the promise of the said defendant corporation in that behalf, entered into the cars of said defendant corporation running between said Portland and said Montreal. Yet the said defendant corporation did not safely carry the said plaintiff in his said passage, and him safely deliver as aforesaid;
44 but, on the contrary, by reason of the insufficiency of the tracks and cars of the said defendant corporation, and the carelessness and gross negligence of the agents and servants of the said defendant corporation employed for the management of the cars, engines, and tracks of said defendant corporation, the car in which the said plaintiff was making the said passage was thrown from the said track, to wit, at Soixante, in the Dominion of Canada, on the second day of May, A. D. 1873; and the said plaintiff being then and there lawfully and properly therein, and in the exercise of due care and caution, was then and there thrown with great violence from his place therein, and by means thereof his right hand was then and there badly burned, by coming in contact with the steam heaters in said car, his left elbow jammed, his right arm lamed, his left hip bruised, and his back and spine seriously lamed and injured, and other grievous injuries, contusions, lamenesses then and there suffered by the said plaintiff by reason of the said cars being thrown from the said track as aforesaid, and the said plaintiff was, by reason of the same, incapacitated from performing any labor, and put to great expense for nursing and medicine, and has suffered intense pain since receiving said injuries as aforesaid, and by reason thereof, and is thereby rendered an incurable invalid, and incapacitated for performing any business and pursuing his usual and ordinary avocations.

Also, for that whereas, on the first day of May last past, at said Portland, and ever since that time, the said defendant corporation
45 was, has been, and now is a common carrier of passengers and freight, and during that time has been accustomed to carry for hire all persons requesting thereto, from said Portland to Montreal, in the Dominion of Canada; and whereas the said defendant corporation was anxious and desirous, to wit, at said Portland, on the day and year aforesaid, of obtaining the advice and assistance and co-operation of the said plaintiff in and about certain business and affairs of the said defendant corporation and of the agents thereof, and was, for the purpose aforesaid, anxious and desirous that the said plaintiff should meet, confer with, advise, and transact the said business for and with the said agents of said defendant corporation at said Montreal, and the said plaintiff then and there, at the special instance and request of the said defendant corporation, promised the said defendant corporation to go to said Montreal for the purpose and business of the said defendant corporation aforesaid, and the said defendant corporation then and there, in

consideration of the said promise of the said plaintiff, undertook and promised to safely carry the plaintiff upon his passage from said Portland to said Montreal and him there safely deliver, and the said plaintiff thereafterwards, to wit, on the same day, at said Portland, took passage in the cars of the said defendant corporation for said Montreal. Yet the said defendant corporation did not safely convey the plaintiff on his said passage and him safely deliver as aforesaid; but on the contrary thereof,

46 by reason of the insufficiency of the trade and cars of the said defendant corporation and the carelessness and neglect of duty of the agents and servants of said corporation in managing, running, and guarding the same, one of the said cars was thrown from the said track, to wit, at Loixante, in the Dominion of Canada, on the second day of May last past, and the plaintiff then and there, upon the said passage, being lawfully and by right therein, and in the exercise of due care and caution, was thereby thrown from his place in said car with great violence, and divers parts of his body was then and there thereby grievously burned, jammed, lamed, bruised, and internally injured, and his back and spine were then and thereby incurably injured; and the said plaintiff has been thereby incapacitated for life from performing any manual labor, and put to great expense for nursing and sickness, and suffered intense pain, protracted sleeplessness, and great bodily suffering since receiving said injuries as aforesaid and by reason thereof, and is thereby rendered a cripple for life and unfitted from pursuing his usual and ordinary avocations.

Also, for that whereas the said defendant corporation was on the day and year aforesaid, to wit, at said Portland, a common carrier of passengers between said Portland and said Montreal, the said defendant corporation then and there promised and undertook, for a certain valuable consideration then and there passing from the said plaintiff to the said

47 defendant corporation, to safely carry and convey the said plaintiff from said Portland to said Montreal, upon their passenger-trains running therebetween, in accordance with their duties and obligations as common carriers of passengers as aforesaid; and the said plaintiff thereafterwards, to wit, on the same day, at said Portland, took passage for said Montreal on one of said passenger-trains, and the said defendant corporation did not safely carry and convey the said plaintiff as aforesaid, but then and there conducted itself so negligently in that behalf that certain cars on said passenger-train were, by reason of the carelessness and negligence of the said defendant's agents and servants, thrown from the track of said defendant corporation, to wit, at Loixante, in the Dominion of Canada, on the second day of May last past, and the plaintiff, being in one of the cars so thrown from the track as aforesaid, was then and there, by reason thereof, and without negligence on his part, grievously bruised, burned, jammed, lamed, and internally injured, and then and there, by reason of said cars being thrown from the track as aforesaid, suffered serious injury to his spine, and has thereby been put to great trouble, suffering, expense, and incapacitated from performing any labor or pursuing his usual avocations further.

Also, for that whereas, on the first day of May last past, at said Portland, and ever since that time, the said defendant corporation was, has been, and is a common carrier of passengers and freight between said Portland and Montreal, in the Dominion of Canada; and whereas

48 the said plaintiff was then and there owner of a certain invention known as a car-coupler, secured by letters-patent dated May fourteenth, A. D. 1872, duly issued from the Patent-Office, in the name of

the United States, and the said defendant corporation was then and there desirous of using said invention upon their railway running from said Portland to said Montreal, and had previously thereto, to wit, at said Portland, on the first day of April, A. D. 1873, agreed to and with the said plaintiff to send one W. McWood, the agent of said corporation, from Montreal to Portland, to conclude an agreement between said corporation and said plaintiff for the use of said invention upon the line of said railway, and the said plaintiff had then and there, in consideration of the said agreement of the said defendant corporation, agreed to sell the use of said invention to said defendant corporation, on the line of their said railway, for a reasonable compensation, to be then and there paid by said defendant corporation to said plaintiff; and the said defendant corporation thereafterwards, to wit, on the twenty-fifth day of April, A. D. 1873, requested the said plaintiff to release them from their said agreement, and in consideration of said release and of said plaintiffs agreeing to go to said Montreal to complete the said agreement with the said McWood at that point, agreed to and with the said plaintiff to safely and securely transport and carry him to Montreal over the line of said railway from said Portland, and to pay the expenses of his journey from said Portland to said Montreal. The said plaintiff, in consideration of the said agreement,
49 and promises of the said defendant corporation, agreeing to and with the said defendant corporation to take the journey aforesaid, and to complete the agreement aforesaid with the said McWood at said Montreal; and the said defendant thereafterwards, to wit, on the first day of May, A. D. 1873, in pursuance of the aforesaid agreement, entered into the cars of the said defendant corporation passing from said Portland to said Montreal; and the said defendant corporation then and there, for the foregoing valuable considerations accruing from the said plaintiff to the said defendant corporation, undertook and promised the said plaintiff to safely carry him, the said plaintiff, upon his passage from said Portland to said Montreal, and him there safely deliver. Yet the said defendant corporation did not safely carry the said plaintiff upon his passage from said Portland to said Montreal, and him there safely deliver as aforesaid; but, on the contrary, by reason of the insufficiency of the track and cars of said defendant corporation, and the careless and grossly negligent manner in managing the same by the said defendant corporation, by their agents and servants employed for that purpose, the car in which the said plaintiff was making said passage was thrown from the said track, to wit, at Soixante, in the Dominion of Canada, on the second day of May, A. D. 1873, and the said defendant was then and there lawfully therein, and in the exercise of due care and caution, and then and there thrown with great violence from his place therein, and by means thereof his right hand was then and there badly burned, his left elbow jammed, his right arm lamed, his
50 left hip bruised, and his back and spine seriously injured, and other grievous injuries, contusions, lamenesses then and there suffered by the said plaintiff by reason of the said cars being thrown from the said track as aforesaid; and the said plaintiff was by reason of the same incapacitated from performing any labor, and put to great expense for nursing and medicine, and has suffered intense pain since receiving said injuries as aforesaid and by reason thereof, and is thereby rendered an incurable invalid, and incapacitated from performing any business and pursuing his usual and ordinary avocations, to the damage of the said plaintiff (as he says) the sum of sixteen thousand dollars,

which shall then and there be made to appear, with other due damages; and have you there this writ, with your doings therein.

Witness Joseph W. Symonds, esq., at Portland, the second day of January, in the year of our Lord one thousand eight hundred and seventy-four.

D. W. FESSENDEN, *Clerk.*

A true copy of writ. Attest:

D. W. FESSENDEN, *Clerk.*

MAINE DISTRICT, *ss:*

C. C. U. S., Ap'l T., 1874.

Entered and filed by defendant.
Attest:

GEO. F. EMERY, *Clerk.*

51 *Petition for removal.*

To the hon. justice of the superior court, holden at Portland, within and for the county of Cumberland, on the first Tuesday of February, A. D. 1874.

Respectfully represents the Grand Trunk Railway Company of Canada that they are now, and were, on the second day of January last, a corporation created by the legislature of the province of Canada, and all whose members are aliens; that a suit has been commenced against said railway company by Ansel Stevens, of Gorham, in the State of Maine, a citizen of said State of Maine, returnable to the present term of this hon. court, and which has been duly entered in said court, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs.

Wherefore the said Grand Trunk Railway Company of Canada, now, at the time of entering their appearance in this court, pray that the said cause may be removed for trial into the next circuit court of the United States, to be holden at Portland, within and for the district of Maine, on the twenty-third day of April, A. D. 1874.

And your petitioners herewith offer good and sufficient surety for the entering in such court, on the first day of its session, copies of said process against them, and for their appearance then and there, and for the doing of all other and further acts by law required in the premises.

GRAND TRUNK RAILWAY COMPANY OF CANADA,
52 By J. HICKSON, *Secretary.*

STATE OF MAINE,
County of Cumberland:

FEBRUARY 6TH, 1874.—Personally appeared John Rand, att'y, for G. Trunk R. Co., and made oath that the facts stated in the foregoing petion are true.

Before me.

BYRON D. VERRILL,
Just. Peace.

Order for removal.

STATE OF MAINE,
Cumberland, ss:

Superior court, Feb. T., 1874.

ANSEL STEVENS
v.
GRAND TRUNK RAILWAY CO. OF CANADA.

And now, on the fifth day of said term, being the seventh day of February, A. D. 1874, the bond in such case made and provided having been filed and approved, the prayer of the within petition is allowed, and it is—

Ordered by the court, that said action above named be transferred to the circuit court for the district of Maine, as prayed for in said petition.

Attest:

D. W. FESSENDEN, *Clerk.*

A true copy of petition & order thereon. Attest:

D. W. FESSENDEN, *Clerk.*

MAINE DISTRICT, *ss:*

C. C. U. S., Ap'l T., 1874.

Filed by the defendant the first day of the term.

Attest:

GEO. F. EMERY, *Clerk.*

53 *Copy of pleading.*

Circuit court U. S., first circuit, Maine district. September T., 1874.

ANSEL STEVENS
v.
GRAND TRUNK RAILWAY CO. OF CANADA.

And now the said def'ts come & defend, &c., when, &c., and say they never promised in manner and form as the pl'ff has in his writ and declaration alleged against them; and of this they put themselves on the country.

By J. & E. M. RAND,
Their Att'ys.

And the pl'ff does the like.

By MATTOCKS & FOX,
His Attorneys.

A true copy of the original. Attest:

GEO. F. EMERY, *Clerk.*

Copy of verdict.

MAINE DISTRICT, *ss:*

C. C. U. S. Sep. T., 1874.

ANSEL STEVENS
v.
THE GRAND TRUNK RAILWAY OF CANADA.

The jury find that the defendant company did promise in manner and form as the plaintiff in his writ and declaration hath alleged, and assess damages for the plaintiff in the sum of twelve thousand eight hundred thirty-three $\frac{33}{100}$ dollars.

$12,833.33. KALLUM TUKEY, *Foreman.*

A true copy of the original. Attest:

GEO. F. EMERY, *Clerk.*

54 *Copy of bond.*

Know all men by these presents that the Grand Trunk Railway Company of Canada, a corporation duly created under the laws of the Dominion of Canada, and having a place of business at Montreal, in said Dominion, as principal, and Charles E. Barrett and John Rand, of Portland, in the State of Maine, as sureties, are holden and stand firmly bound and obliged unto Ansel Stevens, of Gorham, in the State of Maine, in the sum of twenty-five thousand dollars, to be paid to the said Ansel Stevens, his executors, administrators, or assigns; to the which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presidents, sealed with our seals, dated the thirtieth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

The condition of the above obligation is such that whereas the above-bounden Grand Trunk Railway Company of Canada has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in favor of the said Ansel Stevens in a certain suit wherein the said Ansel Stevens was plaintiff and the said Grand Trunk Railway Company of Canada was defendant, by the circuit court of the United States begun and holden at Portland, within and for the district of Maine, in the first circuit, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-four:

Now, therefore, if the said Grand Trunk Railway Company of Canada shall prosecute its said writ of error to effect and answer all
55 damage and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise shall be in full force.

THE GRAND TRUNK R'Y COMPANY OF CANADA, [L. S.]
By I. HICKSON, *Treasurer.*
JOHN RAND. [L. S.]
CH'S E. BARRETT. [L. S.]

Witness:
C. DRINKWATER,
EDWARD M. RAND, to J. R. & C. E. B.

Approved.

G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

MAINE DISTRICT, *ss:*

OFFICE OF THE CLERK C. C. U. S.

Received & and filed Jan'y 8, 1875.
Attest: GEO. F. EMERY, *Clerk.*

A true copy of the original.
Attest: GEO. F. EMERY, *Clerk.*

56 *Citation.*

The United States of America to Ansel Stevens, of Gorham, in the county of Cumberland, and State and district of Maine, greeting:
[SEAL.]

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, Maine district, wherein The Grand Trunk Railway of Canada is plaintiff in error, and you are defendant in error, to shew cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Portland, Maine, this eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-five.

G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

57 UNITED STATES OF AMERICA,
District of Maine, ss:

FEBRUARY 8TH, A. D. 1875.

In obedience to the within precept I have this day cited and admonished the within-named Ansel Stevens by delivering to him in hand a true and attested copy of the within citation.

GARDINER M. PARKER,
Special Deputy U. S. Marshal, District of Maine.

Fees: Service, 2.00; trav., 11 m'ls, 66; copy, 1.00—$3.66.

58 UNITED STATES OF AMERICA,
District of Maine, ss:

I, Geo. F. Emery, clerk of the circuit court of the United States for the district of Maine, hereby certify that the foregoing, from pages 1 to 55, inclusive, contains a true and perfect copy of the record, and of all the proceedings, in the cause Ansel Stevens against The Grand Trunk Railway Company of Canada, determined at the September term thereof, A. D. eighteen hundred and seventy-four.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this thirtieth day of March, A. D. 1875.
[SEAL.] GEO. F. EMERY, *Clerk.*

(Indorsement on cover:) No. 134. The Grand Trunk Railway of Canada, plaintiff in error, vs. Ansel Stevens. Maine C. C. U. S. Filed 24th September, 1875.

Freedom or Murderers
without hire –

SUPREME COURT OF THE UNITED STATES.

GRAND TRUNK RAILWAY CO. OF CANADA,

PLAINTIFF IN ERROR,

v.

ANSEL STEVENS.

ARGUMENT FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

GRAND TRUNK RAILWAY COMPANY OF CANADA,
Plaintiff in error,

v.

ANSEL STEVENS.

BRIEF OF PLAINTIFF IN ERROR.

The now defendant in error, by his original suit sought to recover of the now plaintiff in error, as "a common carrier of persons from Portland to Montreal," damages for a personal injury alleged to have been sustained by him upon the Grand Trunk Railway in May, 1873.

In the first count in his writ he alleges that he was a passenger *for hire* on May 1, 1873, on defendant's railroad from Portland to Montreal.

In the second count he alleges that he was a passenger *for hire and a valuable consideration.*

In the third count he alleges that he was a passenger *without hire, under a free pass* issued to him by defendant Company.

In the fourth count he alleges that defendant Company desired to transact some business with him, and *requested plaintiff to go to Montreal,* and that he agreed to do so.

In the fifth count he alleges that he was a passenger *for a valuable consideration.*

In the sixth count he alleges that he was owner of a car-coupler, and defendant desired to use it, and plaintiff agreed

to sell the use of it to defendant, and to go to Montreal to complete agreement, and *defendant agreed to carry plaintiff to Montreal and to pay his expenses;* and in pursuance of said agreement plaintiff took passage.

Concluding each of his counts with an allegation that while on his way he was injured at Soixante by defendant's negligence, by which one of the cars was thrown from the track.

The first, second, and fifth counts are substantially the same in their legal character and allegations; and we apprehend that they will not require special attention, inasmuch as there is no evidence in the case, nor any pretense, that defendant in error paid any fare or any valuable consideration of any kind for his transportation. Indeed the defendant in error stated distinctly in his testimony, at top of p. 32, that he paid nothing to the Railway Company.

The fourth and sixth counts are similar in their character. Both alleging that the parties had, or rather desired to have, certain business transactions together; and the one alleging that the *Company requested Stevens to go to Montreal*, while the other alleges that *Stevens agreed to go to Montreal, and the Company agreed to carry him and pay his expenses.*

Whether the action could be maintained upon these counts alone, provided the evidence had met and sustained their allegations, and proved nothing beyond them, we think it unnecessary to discuss at length, because the evidence bearing upon these allegations necessarily introduces other facts inseparably connected with those alleged, and materially qualifying them. Indeed, the allegations in these two counts are rather introductory and preliminary—matters of *inducement*—to the third count, which really sets out the plaintiff's case, and the plaintiff's claim as it appeared in the evidence submitted.

This third count alleges that Stevens at the time he sus-

tained his injury was a passenger upon defendant's railway *without hire*, and *under a free pass* issued to him by defendant Company. And upon this count the trial in the Court below was substantially had.

The evidence introduced shows that Stevens, in the spring of 1873, was endeavoring to introduce upon Grand Trunk Railway a car-coupler of his invention. It had already been tried for a short time upon two of their cars; and Stevens was informed that a person would see him in Portland upon the business. It so happened that the person named could not come to Portland, and Stevens was asked if he would go to Montreal upon the business if he could have his expenses paid. Stevens said that he would, and on May 1, a free pass over the road from Portland to Montreal was furnished him. He went to Montreal; but while on the way, at an early hour in the morning of May 2, the Pullman car in which Stevens was riding was thrown from the track, and he was injured. It appeared that the accident was caused by some wheel or wheels of a car in a preceding train during the night having got off the track a little, and by grinding closely against the side of the rail, breaking the bolts from the fish-plates holding the rails. So that when the train on which Stevens was riding came along, it caused the rails to spread, and a part of the cars were thrown from the track. This breaking of the bolts by the previous train had undoubtedly occurred during the night previous; and it does not appear that it was known to any of the railroad men, not even to the conductor of the train whose car got off; as the only witness upon this point says (p. 25, at top, and p. 26, at bottom), that the car may have got on again unobserved. At any rate, there is no evidence of, and the circumstances of the accident do not indicate any "reckless misconduct and negligence."

The questions raised were (apart from that of extent of

plaintiff's injury), whether Stevens was traveling upon the free pass introduced, and if so, whether the Company upon the facts was liable for the injury he sustained. The now plaintiff in error contending that Stevens was so traveling, and that Company was not liable for any injury sustained while so doing. And the now defendant in error, not directly denying that he was so traveling, contending that even if he were so traveling, the Company are liable for any injury sustained.

Upon the evidence (including the free pass), submitted, and after the questions above stated had been fully argued, the defendant corporation requested the Court to instruct the jury,

"First. That if the plaintiff, at the time of sustaining the injury, was traveling under and by virtue of the pass produced in evidence in the case, he was traveling upon the conditions annexed to it.

"Second. That if the plaintiff, at the time of sustaining the injury, was traveling under and by virtue of the pass produced in evidence in the case, the defendants are not liable.

"Third. That if the plaintiff, at the time of sustaining the injury, was traveling as a free passenger, the defendants are not liable.

"Fourth. That if the plaintiff, at the time of sustaining the injury, was traveling as a gratuitous passenger, without any consideration to the defendants for his transportation, the defendants are not liable."

All which instructions and requests were refused by the Court as *inapplicable to the evidence produced.* This District Judge, in half a twinkling of an eye, took upon himself to settle the whole case, law and fact. Deciding, without authority, not only that Stevens at time of accident, was not traveling under and by virtue of the pass produced in evidence; but, in addition, that there was no evidence in the case *even tending* to show that he was so traveling.

This refusal and ruling of the District Judge requires us to look for a moment at the evidence bearing upon this point, because we presume it to be clear that the questions, whether Stevens was traveling under and by virtue of the pass produced in evidence, whether he was traveling as a free passenger, whether he was traveling as a gratuitous passenger, are all questions either of fact, or of mixed law and fact; and in either view, are questions to be determined by the jury.

Now, if there was any evidence in the case *even tending* to show the affirmative of these questions, or which would in any view of it justify a jury in finding the affirmative of these questions: unless the evidence was of such a character that a finding by a jury of the affirmative of these questions could not be sustained; then it was the duty of the Court, and the right of defendant Company to have the questions submitted to the jury under proper instructions. And the course pursued by the judge below was highly exceptionable.

Upon examining the evidence we think the Court will find in the testimony of the plaintiff himself sufficient to warrant, and indeed to require, such affirmative finding. Plaintiff says (p. 28), "Fry asked me if I would go to Montreal and see Wood if I could have my expenses paid. I told him I would, and he told Mitchell to see some person to give me a pass to go. I went to depot, pass was not ready, and conductor kept train waiting. Finally, master mechanic

brought me a pass, and I got aboard as soon as I received it." And on p. 32, "I showed my pass to the conductor; paid nothing to the train conductor."

Now the words "have my expenses paid," did not mean that any money was to be furnished to Stevens, or to be paid to any one for Stevens' expenses. They meant that Stevens was to be carried to Montreal free of expense for his transportation,—a free pass to be given him. A pass was necessary to enable him to go free. He waited for it. He exhibited it to the conductor in order to show him that he was not to pay fare, and he paid no fare. Stevens evidently understood that *payment of expenses* meant *a free pass*, and no more.

We apprehend that it cannot be seriously pretended that Stevens was not traveling under and by virtue of his pass, and upon the conditions thereof; and that a jury would be justified in finding that he was so traveling. And we submit that the defendants requests should not have been refused as "inapplicable to the evidence produced."

Assuming, then, that he was traveling upon this free pass, what is the legal position of the case? and ought the requested instructions to have been given?

Many cases, touching the principle involved, have been at different times before several Courts; and their opinions have been far from harmonious. Some judges have looked upon free passes, or contracts, such as this, as a "*monstrum horrendum*," whose existence even, the generality, called public policy, will not countenance; while others have not been able to discover why contracts fairly entered into, should not bind the parties.

In the decisions with which we are most familiar in New England, I have found but two cases in which the plaintiffs were traveling under a pass, and under circumstances precisely like those in the case at bar. Wells v. N. Y. C. R. R.,

and Perkins v. same, decided by N. Y. Court of Appeals in 1862, and reported in 24 N. Y., 181 and 196. Wells was injured by a collision, and Perkins by the breaking down of a bridge. In both these cases the questions, whether the several plaintiffs were *gratuitous passengers*, and whether the passes exempted the Company from liability for injuries caused by *the negligence* of its servants, were very fully discussed and considered; and in both cases the Court held the affirmative of these questions, and that Company was not liable.

In the case of Bissell v. same Company, decided by the same Court, in the same year, 25 N. Y., 442, plaintiff was traveling under a pass similar to the one at bar, but under circumstances somewhat different, inasmuch as he was riding to take care of his stock. But the Court reaffirmed the doctrine of the Wells case.

The case of Poucher v same Company, decided by the same Court in 1872, 49 N. Y., 263, was similar to the Bissell case; and the Court again laid down the same doctrine. See also Cragin v. N. Y. C. R. R., 51 N. Y., 64.

The same principles have been repeatedly laid down in many other States; many Courts recognizing the above doctrines in all their length and breadth; while others have modified and limited them more or less, under the circumstances of particular cases. Most of these decisions were examined by this Court in the case of Railroad Company v. Lockwood, 17 Wall, 358, and of course particular comments upon them are here unnecessary. Indeed, in this latter case, the whole law upon this subject, so far as applicable to the facts of the case, was fully investigated and expounded by this Court.

The doctrine has been laid down by this Court, that all persons lawfully traveling upon a railroad, although paying no fare, are entitled to recover against the company for any

injury sustained through the negligence of company's servants without fault of the traveler. Such was the case of Derby v. P. & R. R. R., 14 Howard, 468, where Derby was traveling on the road gratuitously by invitation of the president, and was injured by a collision. He recovered in his suit, the Court holding that he was lawfully on road, etc. King v. steamer New World, 16 Howard, 469, was similar in its facts; the captain gave plaintiff a free passage. Court based its judgment in favor of plaintiff upon the same principle, and approved the Derby decision.

These two decisions, as indeed all others, are to be considered and construed in connection with their facts. In neither of them was there any free pass or free ticket. No agreement that the traveler should take the risks of travel. And a decision that a person traveling gratuitously without any agreement to take the risks can recover for an injury sustained, can never be properly cited in support of a claim for damages, by a person traveling under a free pass in which he expressly assumes all risks. We apprehend that the claim of the now defendant in error will receive little aid from these two cases, so dissimilar in their facts.

Whether a railroad company can lawfully stipulate for exemption from liability for injuries resulting from their own negligence, has repeatedly been considered by the Courts, and decisions of all kinds, and of all shades, can be found in the Reports. In submitting a question of this kind, however, to this tribunal, it is our duty to adopt the view expressed by this Court in the Lockwood case; and we understand this Court to hold that in contracts for hire a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable; and that it is not just and reasonable to stipulate for exemption from responsibility for negligence. So much, as a general principle, applicable to the ordinary transportation of persons

and property for hire. A party may be obliged to go himself, or obliged to send merchandise, and may have no other means of carriage or transportation; and in such case it may be said that it is not just and reasonable to subject him to the arbitrary will and pleasure of the carrier. But we infer from the general tenor of the remarks of the Court upon this point, that it would not extend this doctrine to a case like the present, where the plaintiff Stevens had his own option, and the most perfect freedom of choice whether he would go to Montreal or not.

Look for a moment at the position of these parties, as shown by the evidence. Stevens had what he then supposed a valuable invention, and is desirous of having the Railroad Company adopt it. The Company are desirous to adopt it if found to be an improvement; and Stevens is informed that a person will see him in Portland upon the subject. It happens that this person cannot come to Portland, and Stevens is asked if he will go to Montreal if he can have his expenses paid, which meant (as we have before submitted) if he could be carried gratuitously,—have a free pass,—to which Stevens assents. It is optional with him whether he will go or not, and how he will go; whether in the ordinary way upon the ordinary terms, or accept a free pass. No necessity upon Stevens to go. It is a case of that perfect "freedom of choice" which the Court speaks of.

Stevens accepts this free pass, which declares that "*the person accepting this free ticket, in consideration thereof, assumes all risk of all accidents, and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person of the passenger using the ticket.*"

We apprehend that there can be no question that the indorsement upon the pass is a contract between Stevens and the Company. The word "*agrees*" means the concur-

rence of two parties. There are all the essential elements of a contract; "*in consideration thereof*" (of this "free ticket"). Stevens "*expressly agrees*," etc. The law is too clear to admit of doubt.

Wells v. N. Y. C. R. R., *supra*.
Bissell v. N. Y. C. R. R., *supra*.

"In consideration" of this pass, which is your authority for riding free. In consideration of your taking all risks of accidents, we give you this free pass. Upon these terms Stevens accepts it, avails himself of it, and acts upon it. It carries him gratuitously. Is he not a "*free passenger*" in the broadest sense of the words?

The learned Justice who delivered the opinion of this Court in the Lockwood case, commenced by saying, "It "may be assumed *in limine* that the case is one of carriage "*for hire;* and the question is whether a railroad company "carrying a passenger *for hire* can lawfully stipulate not to "be answerable for negligence." And the Court arrive at certain conclusions, and lay down certain principles as applicable to *passengers for hire.* But the learned Judge concludes with the express declaration, "We purposely abstain "from expressing any opinion as to what would have been "the result of our judgment, had we considered the plaintiff "*a free passenger* instead of a passenger for hire."

We submit that the testimony clearly shows Stevens to have been a *free passenger;* and we trust that this Court, upon the principles so clearly laid down in the Lockwood case, will declare that there is a very broad distinction between that case and this in their most material fact, and that their judgment in this case will exonerate the Railroad Company from any liability.

The jury have taken the liberty of finding specially that the plaintiff, previous to the accident, had not read the pass,

and did not know what was indorsed upon it. Such a finding was not warranted by the testimony, and we apprehend that it is quite immaterial to the questions presented to this Court. Stevens testified that he had been a railroad conductor for ten years, and saw free passes and read them very often; and it is a matter of notoriety to every one familiar with railroads that free passes invariably have upon them conditions and exemptions similar to those upon this, and generally in about these words. Upon the face of this pass is a notice calling the attention of the holder to what is on the back. Stevens no where says that he did not read the pass and know its contents *before the accident*. If he did not read it *when he received it*, as a railroad man he must have well known its tenor.

And as matter of law, we submit that he cannot be permitted to deny that he knew and accepted the conditions. In the case of Steen v. Steamship Co., 57 N. Y., 1, the Court say: "In the absence of fraud, concealment, or im-"proper practice, the legal presumption is, that special stipu-"lations contained in a common carrier receipt, limiting his "common law liability, were known and assented to by the "person receiving it. That the party never read the paper "is of no moment." And in the case of Monitor Co. v. Buffum, 115 Mass., 345, it is declared by the Court that, "If a person accept a policy without dissent, the law pre-"sumes that he knows and assents to its contents. Having "accepted the policies and held them as contracts binding "upon the company, he must be taken to hold them accord-"ing to their terms. In the absence of fraud he is con-"clusively presumed to assent to those terms. He cannot "be permitted to qualify his contract, or his relations to the "subject of it, by asserting and proving that he never read "the writing and was ignorant of its contents. If he would "bind the other party he must be bound himself." These

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The jury have taken the liberty of finding specially that the plaintiff, previous to the accident, had not read the pass,

and did not know what was indorsed upon it. Such a finding was not warranted by the testimony, and we apprehend that it is quite immaterial to the questions presented to this Court. Stevens testified that he had been a railroad conductor for ten years, and saw free passes and read them very often; and it is a matter of notoriety to every one familiar with railroads that free passes invariably have upon them conditions and exemptions similar to those upon this, and generally in about these words. Upon the face of this pass is a notice calling the attention of the holder to what is on the back. Stevens no where says that he did not read the pass and know its contents *before the accident.* If he did not read it *when he received it*, as a railroad man he must have well known its tenor.

And as matter of law, we submit that he cannot be permitted to deny that he knew and accepted the conditions. In the case of Steen v. Steamship Co., 57 N. Y., 1, the Court say: "In the absence of fraud, concealment, or im-"proper practice, the legal presumption is, that special stipu-"lations contained in a common carrier receipt, limiting his "common law liability, were known and assented to by the "person receiving it. That the party never read the paper "is of no moment." And in the case of Monitor Co. v. Buffum, 115 Mass., 345, it is declared by the Court that, "If a person accept a policy without dissent, the law pre-"sumes that he knows and assents to its contents. Having "accepted the policies and held them as contracts binding "upon the company, he must be taken to hold them accord-"ing to their terms. In the absence of fraud he is con-"clusively presumed to assent to those terms. He cannot "be permitted to qualify his contract, or his relations to the "subject of it, by asserting and proving that he never read "the writing and was ignorant of its contents. If he would "bind the other party he must be bound himself." These

decisions recognize what we believe to be a well settled principle.

The instruction given by the Court to the jury is quite open to the exception of being "inapplicable to the evidence produced." To a certain extent it ignores the fact that Stevens was traveling upon a free pass; and it presents to the jury a question of "reckless misconduct," which the testimony did not raise, or pretend to raise. There was no evidence in the case of any acts of omission, or of commission, that could be called with any semblance of propriety, "the reckless misconduct" of the defendant Company. The bolts of the rails at the place of accident had been cut by the wheels of some car previously passing along during the night; and one of plaintiff's witnesses testified that these wheels probably did this damage without throwing its car from the track, or giving any notice to any one of what it had done. The trackmen could not discover the damage until the next morning, nor before the night train on which Stevens traveled would reach the spot. So that the testimony shows no "reckless misconduct" of defendant. And the instruction was not only inconsistent with what we submit to be the law applicable to the case, but probably furnished to the jury what they so readily avail themselves of in railroad cases, an excuse for returning a verdict against the Company without regard to the evidence.

We therefore submit that the requested instructions should not have been refused as "inapplicable to the evidence produced;" that they were not only applicable, but were in conformity to the principles of law, and should have been given. The judgment does great injustice to the plaintiff in error, and we trust that we shall be allowed a trial upon the principles for which we respectfully contend.

J. & E. M. RAND,
Counsel for Plaintiff in error.

Supreme Court of the United States.

No. 134, OCT. TERM, 1877.

THE GRAND TRUNK RAILWAY OF CANADA,

PLAINTIFF IN ERROR,

vs.

ANSEL STEVENS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

Brief for Defendant in Error.

FACTS.

This action was originally brought in the Superior Court for the County of Cumberland in the State of Maine, from which court it was removed to the Circuit Court of the United States for the District of Maine upon petition of defendants, and was there tried before a jury, Judge Fox presiding. (Rec. p. 16 and 22). The original writ is dated January 2d, 1874, and was brought to recover for personal injuries sustained by the defendant while riding in one of defendants' passenger cars, May 1, 1873. The defendant

in error was riding under a so called "free pass," (Rec. p. 15,) reading as follows:

NOT TRANSFERABLE.

GRAND TRUNK RAILWAY OF CANADA.

EMPLOYEE'S PASS.

Second Class. Mechanical Department.

No. 301. May 1st, 1873.

Valid only within thirty days from date for one trip West.

PASS M'R. STEVENS

FROM PORTLAND TO MONTREAL.

Why granted? per order Mr. Fry.

Issued by I. N. Martin.

(See other side.) HERBT. WALLIS.

NOT TRANSFERABLE.

On the other side of which were the following printed words, viz:

The person accepting this free ticket, in consideration thereof, assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket.

If presented by any other person than the individual named thereon, the conductor will take up this ticket and collect fare.

The declaration in the original writ alleges that the plaintiff, Ansel Stevens, was, on the 2d day of May, 1873, riding as a passenger from Portland to Montreal in one of defendants' passenger cars. That by reason of the negligence of the agents and servants of dedendant corporation, the car in which plaintiff was riding was thrown from the track at Soixante, Canada, by reason whereof plaintiff was thrown with great violence from the berth in which he was then sleeping and received severe external and internal injuries, which render him a cripple for life. There are six counts in the writ and the contract to carry, and the terms of the carriage are variously set out, but it appears from one of the counts (Rec. p. 19,) that plaintiff was traveling upon a so called "free pass," granted him by certain agents or officers of defendant corporation to enable him to transact certain business with the officials of defendant corporation in Montreal. The plaintiff offered evidence to prove the allegations of the writ. (Rec. p. 9.)

It further appears from the writ. [Rec. p. 5,] as also from the evidence, [Rec. p. 12,] that the plaintiff was the owner of letters patent for a car coupling, which he was desirious of introducing upon the cars of defendants. That defendants had agreed to send one of their agents, [McWood] to Portland, to conclude an agreement with the plaintiff for the use of this coupling upon the Grand Trunk Railway. That finally at the request of defendants, the plaintiff was induced to go to Montreal at the expense of defendants', and thereby enable said McWood to complete this agreement at Montreal instead of Portland. That under this new arrangement as appears by the evidence, the pass in question was presented to plaintiff by one of defendant's agents, [Rec. p. 12,] and that he took passage for Montreal as the result of these negotiations.

The defendant's offered no evidence. The jury returned a verdict for plaintiff and assessed damages in the sum of $12,833.33.

Before the case was submitted to the jury the counsel for the defendant corporation requested the court to instruct the jury. [Rec. p. 15.]

First. That if the plaintiff at the time of sustaining the injury was travelling under and by virtue of the pass produced in evidence in the case, he was travelling upon the conditions annexed to it.

Second. That if the plaintiff at the time of sustaining the injury was travelling under and by virtue of the pass produced in evidence in the case, the defendants are not liable.

Third. That if the plaintiff at the time of sustaining the injury was travelling as a free passenger, the defendants are not liable.

Fourth. That if the plaintiff at the time of sustaining the injury was travelling as a gratuitous passenger, without any consideration to the defendants for his transportation, the defendants are not liable.

Each and all of these instructions and requests of the defendants were refused by the court as inapplicable to the evidence produced; to which refusal, the defendant before the case was committed to the jury, excepted.

The court, instead of the instructions requested by def't, did instruct the jury, as follows, viz:

That if the jury find that in May, 1873, the plaintiff was interested in a car-coupling, which had been used on the cars of the defendant since December previous, and that the officers of the company were

desirous that the plainfiff should meet them at Montreal, to arrange about the use of such coupling on their cars by defendant, and they agreed with him to pay his expenses if he would come to Montreal, and he agreed so to do, and took passage on defendants' cars, and was by the reckless misconduct and negligence of the defendants, and with out negligence on his part, injured whilst thus a passenger in defendants' car, the defendants are not exonerated from liability to plaintiff for his damages occasioned by such negligence, by reason of the endorsement upon the pass produced in evidence.

The jury found specially that the plantiff [Stevens] had not previous to the accident read the pass, and did not know what was endorsed upon it. [Rec. p. 16.] Counsel for defendant corporation excepted to the rulings, instructions and refusals of the court. [Rec. p. 16.]

POINTS.

FIRST.

I. As defendant corporation offered no testimony at the trial, there can be no serious question as to the facts as found by the jury. The question presented is merely the liability of a railroad company in case of accident to a passenger riding on a so-called "free pass" caused by the gross negligence of the common carrier. But the testimony of Stevens, (Rec. p. 12,) shows that the pass was given for a valid and valuable consideration. If this was the fact, and it must be so considered as was not disputed then the case is one of accident to a regular passenger traveling for hire, caused by the gross negligence of a common carrier.

The carrier in this case endeavors to escape liability upon the ground of notice to or a contract with a passenger, whereby such passenger assumed all risk of accidents and expressly agreed that the company should not be liable, under any circumstances, whether by negligence of their agents or otherwise, for any injury to himself.

A common carrier cannot either by notice or contract stipulate for exemption from responsibility for the negligence of himself or his servants.

It will be noticed that in the present case the counsel of de-

fendant corporation requested the court to rule, substantially, that his clients were not liable, even for gross negligence, [Rec. p. 15,] as the pass purports to exempt the defendants from liability for accidents occasioned by their own negligence—in other words, that "they shall not," to use the words of the pass, "be liable under any circumstances, whether of negligence by their agents or otherwise for any injury to the person using the ticket." See words of pass, Rec. p. 15.

It is well settled law that a corporation chartered as a common carrier of passengers, shall not provide against liability for negligence. This view has been sustained by nearly every State in the Union. In Ills. &c. R. R. Co., v. Read, 37 Ills. 844 the language of the ticket was as follows:

"The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket."

Held. That the company was not discharged from liability to a passenger using such a ticket, for an injury occasioned by the gross negligence of one of its employees.

A contract limiting the responsibility of a railway company as a common carrier, does not relieve them from ordinary care in the discharge of their duties.

The most it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them.

Goldey v. Pennsylvania R. R. Co., 30 Pa. St. 242.

The decision in Dorr v. The New Jersey Steam Navigation Co, 1 Kernan 485, is condemned in R. R. v. Lockwood, 17 Wall. 378.

The decisions of the Supreme Court of the United States upon this question, have been uniformly against the position taken here. As it has been held that a common carrier cannot limit his liability by notice not brought home to a passenger or bailor, although he may do so by special contract, it is important to determine whether the printed words on the back of the pass, (Rec. p. 15,) were only a notice or formed a part of the contract set out upon the face of the pass. Why the railway company should not have placed these pretended restrictions of their liability upon the face of the pass in plain sight it is not easy to determine. At all events, it does appear from the evidence that the passenger in this case had no knowledge of these words. He so testified (Rec. p. 12,) and the jury so found, (Rec. p. 16.) Here was then no assent upon the part of the passenger to the terms of the alleged special contract or notice.

We cite the following leading cases:

N. J. St. Nav. Co. *vs.* Merchants' Bank, 6 How. 383.
The Phila. & Reading R. R. Co. *vs.* Derby 14, *id.* 486.
The Steamboat New World *vs. et. al.* King 16, *id.* 469.
The York Company *vs.* Central R R. 3 Wall. 107.
Walker *vs.* The Transportation Co. *id.* 150.
Ex. Co. *vs.* Kountze Brothers, 8 *id.* 342.
R. R. Co., v. Lockwood, 17 Wall. 357.

The earlier English cases were in entire accord with these decisions.

Hinton v. Dibbin, *et. als.* Adolph. & Ellis, (N. S.) 646 S. C. 422, C. L. 847.
Wyld v. Pickford, 8 M. & W. 443.
Peck v. North Stratfordshire R. Co., 10 H. of L. cases 473.

In Poucher *vs.* N. Y. Central R. R. Co. 49 N. Y. 263, where the

court appear to have given a most liberal intrepretation of the conditions of a drover's pass, the injury did not occur while the drover was riding as a passenger, but happened to him as he was walking near the tender through the careless handling of wood by the engineer. The position taken in the New York decisions most favorable to the plaintiff in error are severely censured by this court.

Railroad Co. *vs.* Lockwood, 17 Wall. 363.

A printed endorsement on a season ticket disclaiming liability for any personal injury to the holder, is no defence to an indictment of the corporation under a penal statute for gross negligence.

Commonwealth vs. Vermont & Mass. R. R. Co. 108 Mass. 7.

In case of an accident caused by negligence the jury may give punitive damages.

Milwaukee & St. Paul Ry. Co. vs. Arms, *et. al.* 1 Otto, 489.

And the question of negligence is for the jury.

Steamboat New World vs. King, *supra.*

Storer vs. Gowen, 18 Me. 174.

SECOND.

A pass, purporting to be a free pass upon its face, may, nevertheless, have been given for a consideration, and the holder is thereby constituted a passenger for hire. Indeed, where the fact of negli-

gence is established, there is no difference between a regular passenger ticket and a free pass, and in no case does the law raise a presumption that the holder of a ticket has read any restrictions of a common law liability contained upon it.

A pass given for a consideration, other than a pecuniary one is no greater protection to the carrier than a ticket regularly sold.

The evidence proves beyond a shadow of a doubt that this pass was given in pursuance of a contract to do so, made between the parties for certain valid considerations, whereby plaintiffs in error agreed to safely transport the defendant in error from Portland to Montreal. Rec. p. 12.

In Kinney v. Central R. R. Co, 34, N. J., 513, S. C., 3 Am. Rep. 265, the court virtually decide that if the pass had been given for any consideration as was the drover's pass in Pa. R. R. Co. *vs.* Henderson, 51 Pa. St. 315, and as was the pass in the present case, the decision would have been different.

In Philadelphia & Reading R. R. Co. v. Derby, 14 How. 486, the passenger was riding in a special car by invitation, without paying fare, and the accident occurred by reason of disobedience of orders by one of the employees of the R. R. Co., and yet the carrier was held liable for negligence.

In Wilton v. Middlesex R. R. Co., 107 Mass., 108, the circumstances were similar.

In a recent Minnesota case plaintiff was injured while riding as a passenger upon defendants' railway upon a free pass. The pass contained the statement that it was issued "upon the conditions indorsed hereon," which were these: "The person who accepts and uses this free ticket, thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether by negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it." And the court held that defendant was bound to exercise the same degree of care for a gratuitous passenger as would be required in the case of a passenger paying fare, and was held to the same liability,

and the condition in the pass did not absolve it from liability. Plaintiff when injured, was in the baggage car, with the knowledge of the conductor. And yet the court held that the fact that this was contrary to the rules of defendant, of which plaintiff had knowledge, did not render plaintiff guilty of contributory negligence, which would preclude a recovery.

Jacobus v. St. Paul & Chicago Railway Co., app'l't, 20 Minn., 125. This decision is the same in principle as that in R. R. v Lockwood, *supra.*

The payment of fare is not necessary to create the relation of common carrier and passenger. Upon this principle a railway company was held to be liable for causing the death of a passenger by the negligence of its employees, notwithstanding the passenger was at the time riding upon a free pass, upon which was a stipulation signed by himself, releasing the company from all liability for injury to his person or property while using the same.

Rose v. Des Monies Valley R. R. Co., 39 Iowa, 346.

In Cleveland, Painesville &Ashtabula Railroad Co. v. Curran, 19 Ohio St., 1, S. C. 2 Am. Rep. 362, where the passenger received a drover's pass containing stipulations similar to those in the present case with full knowledge. the Court held that the plaintiff was entitled to recover.

Bissell v. N. Y. Central R.R. Co., 29 Barb. 602, s. c. 25 N.Y. 442.

Poucher v. N. Y. Central R. R. Co., 49 N. Y. 263, and Galin v. London & N. W. R'y Co., L. R. 10, Q. B. 212, can have no weight in this court, since the decision in R. R. v. Lockwood, *supra.*

In Brown *vs.* Eastern R. R. Co. 11 Cush. 97, the presiding justice ruled that taking a ticket which contained limitations as to the carrier's liability raised no legal presumption that the passenger read the printed matter; that it was a question of fact for the jury whether the passenger knew the contents before she started on her journey, and that if she did not read it until she was on her way, her rights were not affected by it, and the ruling was sustained by the law court.

In the present case the defendant in error never knew the conditions of the pass. Rec. p. 16.

THIRD.

It matters not whether an accident occurs from a defect in the track or in the cars of the railway company, or whether the passenger is at the time riding in a car not intended for his use. If the passenger can not be charged with contributory negligence he has the fullest rights known to the law if a case of negligence has been made out as against the carrier.

It appears that the accident, in the present case, occurred from a defect in the railroad track, the same being torn up for several rods in front of the point at which the engine was stopped. [Rec. p 12.] It was through the gross negligence of the agents of plaintiffs in error, that the broken rails had not been repaired before the arrival of the trains. The defect itself was *prima facie* evidence of negligence, and no evidence has been offered to explain or rebut.

A railway company, is liable for any injury to the plaintiff occasioned by a rail which had been broken before the train bearing such passenger came upon it. It is bound to provide a road adapted to the safe passage of the vehicles used over it—a road of continuous *unbroken* rails for each and every train to enter upon in its passage over the road.

McPadden *vs.* N. Y. Central R. R. Co., 47 Barb. 247.

The proprietors of a railroad as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track and in all the subsidiary arrangements necessary to the safety of passengers

M'Elroy *vs.* Nashua & Lowell R. R. Co., sp, 4 Cush. 400

It appears from the evidence, Rec. p. 12, that the defendant in error was, at the time of the accident, in a Pullman car, and was asleep

in his berth. But it matters not in what kind of a car the passenger is riding.

Ohio &c., R. R. Co. v. Muhling, 30 Ills. 9.

Dunn v. Grand Trunk Railway, 58 Me., 187.

FOURTH.

If the plaintiffs in error, are to be governed by the rule laid down in Dyke *vs.* Erie Railway, 45 N. Y. 113, and approved by Judge Redfield, 2 Redfield on Railways, 295, that where the same road extends through parts of different States and the passenger procures his ticket in one State for the entire route and is injured in another State, the law of the place where the ticket was procured will govern, they certainly can derive but little aid from the decisions in Maine, in which State the pass was issued.

In Bean *vs.* Green, *et al.*, 3 Fairfield, 422, the court did not decide that the carrier could by notice exonerate himself from damage caused by his own negligence as that question was not before the court. The decision was merely that a notice not actually brought home to the owner of a trunk lost by the carrier would not affect the owner of the trunk.

In Sager *vs.* P. S. & P. and E. R. R. Co., 31 Me. 228, where the plaintiffs had expressly agreed to exonerate the defendants from all damages that might happen to certain live stock shipped by the plaintiffs, and that they [the plaintiffs] would not call upon the defendants for any damages whatever, the court held that no notice or contract could exonerate a common carrier from liability for damage caused by his negligence or misconduct.

Common carriers of passengers are bound to use greater than ordinary care—such care as is used by very cautious persons; and if a passenger receives an injury, which any reasonable skill and care on their part could have prevented, they are liable therefor.

Edwards vs. Lord, 49 Me. 279.

Common carriers may by contract or notice brought home to the knowledge of the owner and assented to by him, restrict the common law liability against accidental loss or injury, but not against negligence.

In Little *et. al.* vs. Boston & Me. R. R. 65 Me. 488, the court says: Since the decision in Goddard vs. Grand Trunk Railway, 57 Me. 202, it cannot be that the courts of Maine are inclined to be less severe upon common carriers than this court.

Willis, *et al.*, v. Grand Trunk Ry Co., 62 Me, 498.

"The plaintiff's action is based on negligence. They aver that they delivered to the defendants to be carried, a certain quantity of corn, and that "by want of due care and preservation," a portion of it was lost. If this allegation is proved, the plaintiffs are entitled to recover, notwithstanding the printed notice on the margin of the bill of lading that the defendants would not be responsible for any deficiency in weight or measure of grain in bags or in bulk. If such a deficiency is occasioned by their negligence or the nigligence of their servants, the law makes them responsible and will not permit them to exonerate themselves by any notice, condition, or stipulation whatever."

How much care will in a given case relieve a party from the imputation of gross negligence or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define. It is the province of the jury and not of the court to decide whether gross negligence has, or has not been proved.

Storer vs. Gowen, 18 Me. 177.

C. P. MATTOCKS, of Counsel.

47 Barb 247
108 Mass